Supreme Court, U.S.
FILED

98106 9 OCT 13 1998

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1998

JAVIER HERNANDEZ,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California

PETITION FOR WRIT OF CERTIORARI

JONATHAN B. STEINER
Executive Director
(State Bar No. 48734)
Counsel of Record
CALIFORNIA APPELLATE PROJECT
611 Wilshire Blvd., 2nd Floor
Los Angeles, CA 90017
Telephone: (213) 622-7890

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

2688

QUESTION PRESENTED

Whether California's definition of "plain view," (that the police officer is aware of some facts and circumstances which justify a reasonable suspicion that the item is the fruit, instrumentality, or evidence of crime), is consistent with the Fourth Amendment's prohibition against unreasonable searches and seizures as enunciated in *Horton v. California*, 496 U.S. 128 [110 L.Ed.2d 112, 110 S.Ct. 2301] (1990); *Soldol v. Cook County*, 506 U.S. 56 [121 L.Ed.2d 450, 113 S.Ct. 538] (1992); and *Minnesota v. Dickerson*, 508 U.S. 336 [124 L.Ed.2d 334, 113 S.Ct. 2303] (1993).

TABLE OF CONTENTS

Page

PETITION FOR WRIT OF CERTIORARI..... 1

OPINION BELOW..... 1

JURISDICTION..... 1

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE..... 2

HOW THE FEDERAL QUESTION WAS PRESENTED AND DECIDED BELOW..... 2

REASONS FOR GRANTING THE WRIT..... 4

A. *Clark's* Definition of "Plain View" is Less Stringent Than The Tests Formulated By This Court In *Horton*, et. al..... 4

B. The Warrantless Seizure At Issue Is This Case.. 6

C. The Baggie Was Not In "Plain View," and Therefore, It Could Not Be Seized..... 7

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Arizona v. Hicks, 480 U.S. 321 (1987) 5

Coolidge v. New Hampshire, 403 U.S. 443 (1970)..... 3

Horton v. California, 496 U.S. 128 (1990)...3, 4, 5, 6, 7, 8, 9

Minnesota v. Dickerson, 508 U.S. 336 (1993).....3, 4, 5, 6, 8

Payton v. New York, 445 U.S. 573 (1980) 7

Soldol v. Cook County, 506 U.S. 56 (1992) 3, 4

Terry v. Ohio, 392 U.S. 1 (1968)..... 3, 5, 8

Texas v. Brown, 460 U.S. 730 (1987)..... 7

United States v. Place, 462 U.S. 696 (1983)..... 5

United States v. Wright, 667 F.2d 793 (9th Cir. 1982) 5

CALIFORNIA CASE:

People v. Clark, 212 Cal.App.3d 1233 (1989)....3, 4, 5, 6

UNITED STATES CONSTITUTION:

Fourth Amendment.....2, 5

Fourteenth Amendment..... 2

CALIFORNIA RULES OF COURT:

Rule 17.1(c)..... 4

STATUTES:

Health and Safety Code section:
11350..... 2

Penal Code section:

1538.5 2

PETITION FOR WRIT OF CERTIORARI

Petitioner, Javier Hernandez, respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeal of California affirming his judgment of conviction.

OPINION BELOW

The unreported opinion of the California Court of Appeal is reproduced in the Appendix hereto, pages A2 through A10. The unreported order denying the petition for rehearing appears at page A11 and the unreported order denying petitioner's petition for review at page A12.

The judgment of the California Court of Appeal was rendered on April 30, 1998, affirming petitioner's conviction. A petition for rehearing was timely filed and denied on May 19, 1998. A petition for review to the California Supreme Court was timely filed and denied on July 17, 1998.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourth and Fourteenth Amendments are set forth in full in Appendix page A1.

STATEMENT OF THE CASE

Javier Hernandez was charged with possession of a controlled substance in violation of California Health and Safety Code section 11350, subdivision (a). (C.T. p. 15.) Pursuant to California Penal Code section 1538.5, counsel made a motion to suppress the cocaine recovered by the police as a result of their search of petitioner. Finding that the furtive motion petitioner made when the police approached him in the street created legal grounds for the search, the court denied the motion. (C.T. pp. 20-21, 25; R.T. p. 31.)

HOW THE FEDERAL QUESTION WAS PRESENTED AND DECIDED BELOW

After waiving his constitutional rights (R.T. pp. 38-41), petitioner pled no contest. (R.T. pp. 43-44.) The court sentenced petitioner to 32 months. (C.T. p. 29; R.T. p. 45.)

On appeal, petitioner challenged the constitutionality of the warrantless search of his person. Specifically, petitioner argued that the arresting officer lacked the probable cause necessary to reach into petitioner's pocket and remove a plastic baggie which was slightly protruding

from the pocket; i.e., the officer went beyond the permissible scope of a patdown, as defined in *Terry v. Ohio*, 392 U.S. 1, 22 [20 L.Ed.2d 889, 88 S.Ct. 1868] (1968).

In affirming petitioner's conviction, the California Court of Appeal held that whether the officer had probable cause to remove the baggie was irrelevant because the baggie was in "plain view" and, therefore, the officer could constitutionally seize it. (Appendix pp. A5-A7.) In doing so, the Court of Appeal relied on the following definition of "plain view" found in *People v. Clark*, 212 Cal.App.3d 1233 (1989): "(1) the officer must be lawfully at the place where the evidence is discovered, (2) the discovery must be inadvertent, and (3) the object discovered must be immediately apparent as evidence." (*Id.*, at p. 1238, citing *Coolidge v. New Hampshire*, 403 U.S. 443, 465-467 [29 L.Ed.2d 564, 582-583, 91 S.Ct. 2022] (1970).)

Petitioner filed a petition for rehearing on the ground that the Court of Appeal relied upon the wrong standard of "plain view." Petitioner argued that *Clark* was inconsistent with *Horton v. California, supra*, 496 U.S. 128; *Soldol v. Cook County, supra*, 506 U.S. 56; and *Minnesota v. Dickerson, supra*, 508 U.S. 336 [124 L.Ed.2d 334, 113 S.Ct. 2303] (1993). The Court of Appeal denied the petition. (Appendix p. A11.) Similarly, the California Supreme Court denied a petition for review based on the same claim of constitutional error. (Appendix p. A12.)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this case presents an issue to which rule 17.1(c) applies; i.e., the California Court of Appeal decided an important question of federal constitutional law which has not been, but should be, settled by this Court, namely: Whether the definition of "plain view" enunciated by this Court in the above cited cases is the only constitutionally acceptable definition or whether a state may employ a different, less stringent, test?

A. *Clark's* Definition of "Plain View" is Less Stringent Than The Tests Formulated By This Court In *Horton*, et. al.

The Court of Appeal relied exclusively on *People v. Clark* in concluding the plastic baggie seized from petitioner's pocket by police was in "plain view."[1] According to the Court of Appeal's interpretation of *People v. Clark*, in order "to seize evidence in plain view, an officer lawfully must be where the evidence is discovered, must make the discovery inadvertently and it must be apparent immediately that the object discovered is evidence." (Appendix pp. A5-A6.) This three-part test is less stringent than the standard enunciated by this Court in *Horton* and its progeny.

---

[1] The Court failed to follow or even cite the standards enunciated by this Court in *Horton v. California, supra*, 496 U.S. 128; *Soldol v. Cook County, supra*, 506 U.S. 56; and *Minnesota v. Dickerson, supra*, 508 U.S. 336.

There are at least three differences between the test announced in *Clark* and the one originally promulgated by this Court in *Horton*. First, *Horton* expressly eliminated the inadvertence requirement found in *Clark* and many prior decisions. (*Horton v. California, supra,* 496 U.S. at p. 130.)

Second, and more important, the Court in *Horton* put forth a different three-part test of when the seizure of an item in "plain view" is permitted.[2] This test is premised on probable cause and not the lesser standard of reasonable suspicion, as is the three-part test in *Clark*. (*Minnesota v. Dickerson, supra,* 508 U.S. at p. 375; *People v. Clark, supra,* 212 Cal.App.3d at p. 1239.) Indeed, the Court in *Clark* would allow "a brief perusal in order to see whether probable cause to permanently seize the object arises."[3] (*Ibid.*, citing *United States v. Wright,* 667 F.2d 793,

---

[2] The test in *Horton* is as follows: (1) the officer must not have violated the Fourth Amendment in arriving at the place from where the object was seen; (2) the object's incriminating character must be "immediately apparent"; and (3) the officer must have a lawful right of access to the object itself. (*Horton v. California, supra,* 496 U.S. at pp. 136-137.)

[3] The court in *Clark* distinguished *Arizona v. Hicks,* 480 U.S. 321, 327 [94 L.Ed.2d 347, 107 S.Ct. 1149] (1987), (which held that the seizure of objects found in plain view must be based on probable cause), on the ground that the object found in *Clark* was on the defendant's person and not merely in an unoccupied apartment as in *Hicks*. Relying on *Terry* and *United States v. Place,* 462 U.S. 696, 702 [77 L.Ed.2d 110, 103 S.Ct. 2637] (1983), the court allowed the police to remove jewelry, seen in plain view, from petitioner's pocket.

797 (9th Cir. 1982).) On the other hand, *Dickerson* specifically forbids such perusing without probable cause. (*Minnesota v. Dickerson, supra,* 508 U.S. at p. 375.)

Third, *Horton* requires, while *Clark* does not, that the officer have a constitutional right of access to the item. (*Horton v. California, supra,* 496 U.S. at pp. 136-137.)

These differences are clearly material and, therefore, the test in *Clark* is not a perfect substitute for the one in *Horton*. The question for review is whether this standard enunciated in *Clark,* and relied upon by the Court of Appeal in this case, is constitutionally acceptable even though it is based upon the lower standard of reasonable suspicion. If it is not, then the Court of Appeal violated petitioner's Fourth Amendment rights by relying upon the definition of "plain view" found in *Clark,* to the exclusion of the test found in *Horton,* in concluding the baggie was in "plain view."

B. The Warrantless Seizure At Issue Is This Case.

At approximately 1:40 a.m., Los Angeles County Deputy Sheriff Sean Banks and his partner were patrolling the 900 block of Fraser Avenue in East Los Angeles. Deputy Banks observed a small blue compact car stopped in the middle of the street impeding traffic. There was one person in the car and two men, one of whom was petitioner, standing outside the car on the passenger side.

When Deputy Banks turned his vehicle's spotlight on the blue compact car, the two men standing outside stepped away. As petitioner backed away, "he quickly went to the coin pocket" on his jeans. Subsequently, the

deputy could see a plastic baggie protruding from that pocket. The deputy approached petitioner and removed the baggie from petitioner's pocket. The baggie contained .076 grams of cocaine.

C. The Baggie Was Not In "Plain View," and Therefore, It Could Not Be Seized.

It is well recognized that a police officer can seize objects such as weapons or contraband found in "plain view" because no invasion of privacy is involved. (*Texas v. Brown*, 460 U.S. 730, 738 [75 L.Ed.2d 502, 103 S.Ct. 1535] (1987); *Payton v. New York*, 445 U.S. 573, 587 [63 L.Ed.2d 639, 100 S.Ct. 1371] (1980).) In order for a police officer to constitutionally seize an object in "plain view," however, the following three conditions must be met: (1) the officer must not have violated the Fourth Amendment in arriving at the place from where the object was seen; (2) the object's incriminating character must be "immediately apparent"; and (3) the officer must have a lawful right of access to the object itself. (*Horton v. California, supra*, 496 U.S. at pp. 136-137.)

Here, as to the first condition, petitioner concedes the officer was in a place he had a right to be. As to the second condition, however, Deputy Banks did not have probable cause to believe the baggie contained narcotics. In fact, the Court of Appeal found "that the partially protruding plastic bag did not appear immediately to be evidence." (Appendix p. A6.) When, as in this case, "the police lack probable cause to believe an object in plain view is contraband without conducting some further search of the object – i.e., if 'its incriminating character [is

not] "immediately apparent,' " *Horton, supra,* at 136, 110 L.Ed.2d 112, 110 S.Ct. 2301 – the plain-view doctrine cannot justify its seizure." (*Minnesota v. Dickerson, supra,* 508 U.S. at p. 375 (1993).) The "plain view" doctrine only applies if neither the observation nor the seizure of the article involved any invasion of privacy. (*Horton v. California, supra,* 496 U.S. at p. 133.) Here, because Deputy Banks had to remove the baggie to ascertain its contents, the second condition of the *Horton* test is not satisfied. The incriminating nature of the baggie simply was not immediately apparent. (*Id.,* at p. 136.)

Likewise, the third condition is not satisfied. Without probable cause to believe the baggie contained contraband, Deputy Banks had no authority to remove the baggie from petitioner's coin pocket. Even if the property seized is in plain view, a police officer's entry into a suspect's pocket to retrieve narcotics can only be justified if the officer had probable cause to arrest the suspect for possession before the entry. (See, e.g., *Minnesota v. Dickerson, supra,* 508 U.S. at p. 373 [police may seize nonthreatening contraband detected during a patdown so long as the officers stay within the bounds of *Terry v. Ohio;* i.e., the officer must have probable cause to believe the object is contraband without conducting some further search].) Here, Deputy Banks did not have probable cause to arrest petitioner prior to removing the baggie from his

pocket,[4] and therefore, the third-part of the *Horton* test is not satisfied either.

Since neither the second nor the third conditions of *Horton* were satisfied in this case, Deputy Banks seizure of the baggie from petitioner's pocket could not properly be upheld under the "plain view" doctrine as defined by this Court in *Horton, et. al.* It could, however, be upheld under California Law. Consequently this Court should grant petitioner's petition for certiorari to resolve the apparent conflict between this Court's interpretation of "plain view" and that of the California courts.

WHEREFORE, petitioner prays for a writ of certiorari, to issue to the Court of Appeal of California.

Dated: December 30, 1998

Respectfully submitted,

JONATHAN B. STEINER
Executive Director
CALIFORNIA APPELLATE PROJECT
611 Wilshire Boulevard
2nd Floor
Los Angeles, California 90017
Telephone: (213) 622-7890
Attorney for Petitioner

---

[4] The Court of Appeal avoided deciding whether Deputy Banks had probable cause to arrest prior to removing the baggie because it found the seizure was justified under the "plain view" doctrine.

APPENDIX

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAVIER HERNANDEZ, Defendant and Appellant.	)	B117211 (Super. Ct. No. BA147976)

(Filed Apr. 30, 1998)

APPEAL from a judgment of the Superior Court of Los Angeles County, Larry P. Fidler, Judge. Affirmed.

California Appellate Project, Jonathan B. Steiner, Executive Director, and Richard Fitzer, Staff Attorney, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, and Joseph P. Lee, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Javier Hernandez appeals from a judgment entered after the trial court denied his motion to suppress evidence pursuant to Penal Code section 1538.5 and he changed his plea to guilty of the possession of narcotics (Health & Saf. Code, § 11350, subd. (a)). Defendant also admitted he previously had been convicted of a serious or violent felony, robbery, within the meaning of Penal Code section 667, subdivisions (b) through (i), the "Three Strikes" Law. The court thereafter sentenced defendant to state prison for the term prescribed by law.

STATEMENT OF FACTS

At approximately 1:40 a.m. on March 29, 1997, Los Angeles County Deputy Sheriff Sean Banks and his partner were on patrol in East Los Angeles. Deputy Banks saw a small blue automobile stopped in the middle of the street. The automobile was impeding traffic; its brake lights were not illuminated, which suggested it was stopped more than momentarily. Defendant and another man were leaning inside the passenger window of the automobile.

When Deputy Banks shined his spotlights on the automobile, defendant immediately stepped away and made a furtive gesture towards the coin pocket of his pants. Deputy Banks stepped out of his patrol vehicle. When he shined his flashlight at defendant, he saw part of a plastic bag protruding from the coin pocket. From his training and experience, Deputy Banks knew narcotics such as heroin and cocaine often were packaged in plastic

bags. He therefore suspected that the bag might contain narcotics.

Deputy Banks approached and retrieved the bag from defendant's coin pocket. It contained .076 grams of powder cocaine.

Defense

Jesus Vega (Vega), the driver of the blue automobile, had just dropped off defendant and another friend when the deputies arrived. The deputies ordered all three men to put their hands on the rear of the patrol vehicle, then searched them. After one deputy retrieved a pack of cigarettes from the top of the patrol vehicle, defendant was arrested. Vega did not see the police remove a plastic bag from defendant's pocket. He was not in a position where he could have seen this, however.

CONTENTIONS

I

Defendant contends the trial court erred in failing to suppress evidence obtained in a warrantless search of his person made without probable cause.

II

Defendant asserts the trial court abused its discretion in failing to strike his prior "three strikes" conviction.

DISCUSSION

I

Defendant contends the trial court erred in failing to suppress evidence obtained in a warrantless search of his person made without probable cause. We disagree.

A motion to suppress evidence presents questions of both fact and law. Questions of fact, which are confided in the first instance to the lower court, will be subject to the substantial evidence test on review (*People v. Williams* (1988) 45 Cal.3d 1268, 1301, cert. den. (1989) 488 U.S. 1050; *People v. Green* (1996) 46 Cal.App.4th 367, 372), but where the facts are not in dispute, this court may review the matter de novo (*People v. Koury* (1989) 214 Cal.App.3d 676, 685; *People v. Workman* (1989) 209 Cal.App.3d 687, 694, review den. July 20, 1989). Our review is limited strictly to the record of the suppression hearing, however. (*People v. Hunstman* (1984) 152 Cal.App.3d 1073, 1086; see also *People v. Webb* (1986) 186 Cal.App.3d 401, 410.) We apply the facts to the pertinent constitutional standards. (*Green, supra,* at p. 372; *People v. Gonzalez* (1989) 211 Cal.App.3d 1043, 1050.)

The removal of the baggie from defendant's pocket cannot be justified as incident to an investigative detention. The plastic bag partially protruding from the coin pocket of defendant's pants could not have contained any weapon larger than a nail file. The officers did not subject defendant to a pat-down search and ascertain from the tactile contours of the bag that it contained a weapon. Indeed, a pat-down would have led them to the opposite conclusion. The officers therefore were not justified in seizing the bag as the probable container of a weapon;

they could not seize it solely to preserve evidence. (*People v. Valdez* (1987) 196 Cal.App.3d 799, 805.)

The People suggest the search may be justified as one incident to arrest. Such a search may precede the arrest "as long as the officer had reasonable cause before the search to make the arrest." (*People v. Valdez, supra,* 196 Cal.App.3d at p. 805, italics omitted.) We need not determine whether the officers had probable cause to arrest defendant before they seized the plastic bag, for there is another basis upon which the seizure could be made.

Part of the plastic bag was protruding from the coin pocket of defendant's pants. The bag thus was in plain view. To seize evidence in plain view, an officer lawfully must be where the evidence is discovered, must make the discovery inadvertently and it must be apparent immediately that the object discovered is evidence. (*People v. Clark* (1989) 212 Cal.App.3d 1233, 1238.) An object in plain view "may be inspected[, however,] when the officer is " 'aware of some facts and circumstances which justify a *reasonable suspicion* (not probable cause) that the item [is] the fruit[ ], intrumentalit[y], or evidence of crime.' " [Citation.]" (*Id.* at p. 1239, italics in the original.) This principle permits a brief perusal of the object. (*Ibid.*)

There is no doubt that the deputies met the first two criteria essential to a valid plain view seizure. It is equally clear that the partially protruding plastic bag did not appear immediately to be evidence. The question, then, is whether there were facts and circumstances which would justify a reasonable suspicion that the bag and its contents were the fruit, instrumentality or evidence of a crime.

In the early morning hours, approximately 1:40 a.m., the deputies encountered an automobile stopped in the middle of the street, impeding traffic. The automobile's brake lights were not illuminated; this suggested more than a mere momentary stop. Defendant and another man were leaning into the automobile through the passenger window. When the deputies turned their spotlights on the automobile, defendant stepped away and immediately moved his right hand furtively towards the coin pocket of his pants. When Deputy Banks approached the automobile and shined his flashlight at defendant, he saw that part of a plastic bag was protruding from the coin pocket of defendant's pants. From training and experience, Deputy Banks knew that narcotics often are packaged in plastic bags of this type.

As defendant notes, a plastic bag is a common container. There is no evidence this was an area renowned for drug sales, that the deputies had observed an exchange of what appeared to be money and product or that defendant appeared to be under the influence of narcotics. Nonetheless, the totality of the circumstances justified Deputy Banks in entertaining a reasonable suspicion that the plastic bag and its contents were evidence of a crime.

In addition to an automobile illegally *parked* in the middle of the street late at night, into which two men were leaning, there is defendant's furtive gesture and the *location* of the plastic bag, a known container of narcotics. To be sure, a furtive gesture "must be invested with guilty significance . . . by additional suspicious circumstances observed by [an officer]." (*Gallik v. Superior Court*

(1971) 5 Cal.3d 855, 859.) Here, it *was* invested with guilty significance.

A coin pocket is a very small receptacle. Unlike an ordinary pants pocket, there are very few innocent items contained in plastic bags that a coin pocket will hold. As noted in *People v. Gonzales* (1989) 216 Cal.App.3d 1185, "Here the packaging was known to the officer to be commonly used for drugs: A sandwich [or even a candy bar] could hardly fit in [defendant's coin] pocket. Its 'distinctive character . . . spoke volumes as to its contents – particularly to the trained eye of the officer.' " (At p. 1191.) Moreover, Deputy Banks could have identified the plastic bag as a narcotics container simply by feeling its contours. In that respect it is akin to a heroin balloon. (*People v. Valdez, supra,* 196 Cal.App.3d at p. 806.)

When the totality of the circumstances is considered, Deputy Banks was justified in entertaining a reasonable suspicion not amounting to probable cause that the plastic bag and its contents were evidence of a crime. That suspicion justified Deputy Banks in taking possession of the plastic bag to inspect its character and contents briefly. (*People v. Clark, supra,* 212 Cal.App.3d at p. 1239.) Upon inspecting the bag and ascertaining that it appeared to contain narcotics, Deputy Banks was justified in seizing this evidence in plain view. (*Id.* at p. 1238.) The trial court therefore did not err in denying defendant's suppression motion.

II

Defendant asserts the trial court abused its discretion in failing to strike his prior "three strikes" conviction. We discern no merit in the assertion.

In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, the Supreme Court held that when a defendant is sentenced under the "Three Strikes" Law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12), the sentencing court retains the discretion under Penal Code section 1385, subdivision (a), to strike the prior convictions on its own motion in the interests of justice. (*Romero, supra,* at pp. 504, 529-530.) Because a decision to strike or not strike a prior conviction lies within the discretion of the trial court, we cannot reverse that decision except for an abuse of discretion. (*Ibid.*)

The abuse of discretion standard is a deferential one. (*People v. Williams* (1998) 17 Cal.4th 148, 162.) The question is whether the trial court's action " 'falls outside the bounds of reason' under the applicable law and the relevant facts." (*Ibid.*) That is, whether the trial court's action is one which would not have been taken by a reasonable judge (*People v. Superior Court (Romero), supra,* 13 Cal.4th at pp. 530-531) or the trial court has acted "in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice" (*People v. Jordan* (1986) 42 Cal.3d 308, 316).

Additionally, " '[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted

to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.] Concomitantly, '[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citations.]' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

In deciding whether to dismiss prior convictions under section 1385, subdivision (a), the trial court must consider the defendant's background, the nature of his current offense and other individualized considerations. (*People v. Superior Court (Romero), supra*, 13 Cal.4th at p. 531.) It must determine whether, in light of defendant's present and past offenses, "and the particulars of his background, character, and prospects, the defendant may be deemed outside the ['Three Strikes'] scheme's spirit, in whole or in part, and hence should be treated as though he had not presently committed one or more . . . serious and/or violent felonies." (*People v. Williams, supra*, 17 Cal.4th at p. 161.)

In *People v. Bishop* (1997) 56 Cal.App.4th 1245, a case recently decided by this court, the trial court struck one of the defendant's prior convictions for the reasons that the prior convictions were remote in time, the current offense was not violent and the sentence which would otherwise be imposed seemed appropriate. (At p. 1248.) The reasons stated in *Bishop* might apply to this case also.

This court upheld the trial court's exercise of discretion, noting that the defendant was "not a worthy member of society. But when his misdeeds are compared with those of the far too many violent recidivists in this state, he is not the worst we have seen." (*People v. Bishop, supra,* 56 Cal.App.4th at p. 1251.) This could be said of defendant as well. This court went on to state, however, that "[w]hile the People and perhaps even this court may be of the opinion that Bishop appears undeserving of leniency, the paramount consideration is not what the prosecution, defense or appellate court might conclude. Rather, what counts is what the trial court in this case concluded. . . . " (*Ibid.*)

Here, the trial court concluded defendant was undeserving of leniency. While his prior robbery conviction was relatively remote, having occurred in 1985, it was not extremely remote. This was his only prior brush with the criminal justice system but not his only prior violation of the law. Upon his release from jail in 1986, defendant was deported. He reentered the country illegally in 1987; he again was deported. Inasmuch as he was in the country when the instant offense occurred, he obviously once again entered illegally. As the trial court noted, this demonstrated an extreme disrespect for the law. There is no record of defendant's employment history. There thus are no facts to suggest that he will refrain from crime in the future. Finally, the doubled sentence imposed in this case, 32 months, seems an appropriate one.

Under these circumstances, the trial court did not abuse its discretion in declining to strike defendant's prior conviction. That it might not have been an abuse of

discretion for the trial court to have exercised its discretion in defendant's favor, as in *Bishop*, does not demonstrate an abuse of discretion in refusing to strike his prior conviction. (*People v. Superior Court (Alvarez), supra*, 14 Cal.4th at pp. 977-978; *People v. Bishop, supra*, 56 Cal.App.4th at p. 1251.)

The judgment is affirmed.

NOT TO BE PUBLISHED

SPENCER, P.J.

We concur:

ORTEGA, J.

VOGEL (Miriam A.), J.

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 1 DATE: 05/19/98

RECEIVED FOR RF
MAY 21 1998

Cap
Richard Fitzer
611 Wilshire Blvd.
Suite 200
Los Angeles, CA. 90017

RE: People of the State of California
VS.
Hernandez, Javier Alonzo
2 Criminal B117211
Los Angeles NO. BA147976

THE COURT:

PETITION FOR REHEARING DENIED.

Second Appellate District, Division One, No.B117211
S070856C

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

JAVIER HERNANDEZ, Appelllant

(Filed July 15, 1998)

Appellant's petition for review DENIED.

GEORGE,

Chief Justice

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV of the Constitution of the United States provides, *inter alia* that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV provides:

> Sect. 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
